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No. 79-1877

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

HAROLD N. EVANSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's order imposing sanctions under Rule 37(b)(2)(A), Fed. R. Civ. P., is a final order appealable under 28 U.S.C. 1291.

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[1]Other respondents are the United States; Honorable Earl R. Larson, United States District Judge; Gayland B. Miller d/b/a Heights Auto Wash; Stephen T. Graham; Brookdale Car Wash, Inc.; John Vitale; Keystone, Inc.; Jerome F. Hanover; Central Car Wash, Inc.; Alex M. Berco d/b/a Loring Auto Wash Company; Donald L. Elsen; Richard P. Elsen; James V. Casey; Glo-Auto Wash, Inc. of Lincoln Park; and Glo-Auto Wash, Inc., of Dearborn.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-7) is reported at 619 F. 2d 72. The district court's memorandum order of December 14, 1979 (Pet. App. A-12 to A-21) is reported at 85 F.R.D. 274.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1980. On May 12, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 27, 1980. The petition was filed on May 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

On December 13, 1975, the private respondents brought this class action against petitioner in the United States District Court for the District of Minnesota, alleging that petitioner willfully violated pricing regulations in its sales of motor gasoline. The complaint alleged that petitioner had violated pricing regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* On March 22, 1978, the United States, on behalf of the Department of Energy (DOE), intervened as a party plaintiff in this action.

During discovery proceedings, petitioner responded to several interrogatories concerning its determination of May 15, 1973, weighted average prices. After some investigation, respondents alleged that the answers to these interrogatories were false. In an order issued on August 14, 1979, the district court found that probable cause existed to believe the answers were false and

scheduled a hearing at which petitioner was directed to present witnesses to explain the answers and, if the answers proved to be false, to testify concerning appropriate sanctions (Pet. App. A-8 to A-11). After an evidentiary hearing on October 3-5, 1979, and the submission of post-hearing briefs, the district court found that the interrogatories had been answered falsely and that earlier answers on the same subject had been evasive (*id.* at A-17).

In considering the appropriate sanctions to be imposed against petitioner under Rule 37, Fed. R. Civ. P., the district court rejected the private respondents' suggestion that it should find that petitioner had "intentionally" and "willfully" disregarded the applicable pricing regulations (Pet. App. A-18). That finding would have effectively precluded an affirmative defense to treble damages under Section 210(b) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note.[2] Instead, the court ruled that, as a result of petitioner's conduct, the following facts relating to the falsified interrogatories would be "deemed to be established" (Pet. App. A-19 to A-20):

> 1. The [petitioner] knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.
>
> 2. That for all classes of customers [petitioner] did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.

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[2]A proviso to Section 210(b) of the ESA also requires that, unless the overcharge is "willful" within the meaning of Section 208(a) of that Act, the plaintiff must have given the defendant an opportunity to refund the overcharge.

> 3. That the responsible executives of [petitioner] and therefore [petitioner] itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.

The district court also directed petitioner, under Rule 37(b)(2), to pay the costs incurred by the non-government plaintiffs that were directly caused by petitioner's false replies.

Petitioner filed an immediate appeal of the order imposing sanctions. The court of appeals dismissed the appeal on the ground that the order was not appealable under 28 U.S.C. 1291 (Pet. App. A-4 to A-6). The court rejected petitioner's argument that appeal was permissible under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), stating that the order imposing sanctions involved "matters that are 'enmeshed in the factual and legal issues' " of the case (Pet. App. A-6). The court also denied petitioner's alternative petitions for writs of mandamus and prohibition because none of the district court's actions constituted "either a usurpation of power or a clear abuse of discretion" (*id.* at A-7).

ARGUMENT

1. Petitioner contends (Pet. 15-19) that the court of appeals erred in holding that the district court's order was not appealable under 28 U.S.C. 1291 as a "collateral order."[3] This contention is without merit.

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[3]At the outset, we note that the petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of ESA, 12 U.S.C. 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to

a. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held appealable an order denying the defendant's motion to require the plaintiff to post security for reasonable expenses pursuant to a state statute. The Court found that the order fell within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." 337 U.S. at 546. A critical factor in this determination was that the district court's order "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment." *Ibid.* The "collateral order" doctrine of *Cohen* applies only in those few cases where the order "resolve[s] an important issue completely separate from the merits of the

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review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. * * *

The judgment of the court of appeals was entered on April 7, 1980, and the petition was not filed until May 27, 1980. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of the time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to TECA cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 17-18.

action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

The pretrial order involved here clearly does not fit within the narrow *Cohen* exception. The sanctions imposed under Rule 37(b)(2)(A) are not collateral to the underlying issues of the case. Rather, the facts that are deemed to be established are ones that go to the heart of the plaintiffs' substantive claims. Thus, as the court of appeals stated, the sanction order involves "matters that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' " (Pet. App. A-6, quoting *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963)). However, the facts deemed to be established under the sanction order do not completely resolve the merits of the pending litigation. The district court specifically rejected the private respondents' suggestion that the sanctions include a finding of "willful" violations by petitioner (Pet. App. A-18 to A-19). Thus, as the court of appeals pointed out (Pet. App. A-6), all of petitioner's defenses on the merits have not been foreclosed. In addition, the amount of damages to the private respondents and the amount of overcharges to other purchasers, which is the focus of the government's action, remain to be determined.

Moreover, petitioner suggests no reason why the district court's sanction order cannot be fully reviewed, together with other issues that may arise, after the case is tried and final judgment entered. Permitting the appeal to be heard now would seriously delay the resolution of this litigation.[4] In sum, the order sought to be reviewed here is

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[4]The trial of this case is now scheduled to begin in September 1980, although it may have to be delayed for a short time pending a decision on this petition. Petitioner suggests (Pet. 18) that an

not collateral, but closely tied to the merits of the case, and it is equally subject to review when a final decision is reached on the merits. Accordingly, *Cohen* does not authorize review under 28 U.S.C. 1291 at this time.

b. Petitioner contends (Pet. 15-17), however, that the decision of the court of appeals creates a conflict in the circuits that requires resolution by this Court. This contention is also without merit.

Although there have not been many instances of attempted appeals from sanctions imposed under Rule 37(b)(2)(A), the prevailing view is that such orders are "clearly interlocutory." 4 *Moore's Federal Practice* para. 26.83[7] at 26-101 (2d ed. 1980). The Third Circuit has held that an order imposing such sanctions is not immediately appealable. *Cromaglass Corp.* v. *Ferm*, 500 F. 2d 601, 604-605 (1974). And courts have generally taken the same view concerning other types of sanctions imposed under Rule 37(b). See *In re Attorney General of the United States*, 596 F. 2d 58, 61 (2d Cir. 1979), cert. denied, No. 78-1702 (Oct. 9, 1979) (civil contempt); *David* v. *Hooker, Ltd.*, 560 F. 2d 412, 416 n.6 (9th Cir. 1977) (attorney's fees and expenses); *Independent Investor Protective League* v. *Touche Ross & Co.*, 542 F. 2d 156, 157-158 (2d Cir. 1976) (expenses).[5]

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immediate appeal would eliminate the inconvenience of requiring it to undergo an unfair trial. As the Court remarked in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943), however, "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."

[5]Of course, an order under Rule 37(b) may be appealable if it represents a final disposition of the case, such as an order entering a default judgment. See *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d 1118 (5th Cir.), cert. denied, 400 U.S. 878 (1970).

The one case that appears on its face to depart from this rule is *State of Ohio* v. *Arthur Andersen & Co.*, 570 F. 2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978). The court there affirmed an order imposing certain preclusionary and monetary sanctions for non-compliance with discovery orders, stating without any analysis that the sanctions were a final disposition of a claimed right collateral to the cause of action. 570 F. 2d at 1372. The court's decision, however, was motivated in large part by the allegation that compliance with the discovery orders would have required the defendant to violate Swiss law—a burden that obviously could not have been removed by appeal of the final judgment. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958). No consideration of this sort is present in the case at bar. In light of the well-settled law in this area, the Tenth Circuit's decision in this special fact situation does not present a conflict that warrants this Court's review.

The other cases relied upon by petitioner are simply inapposite. Contrary to petitioner's suggestion (Pet. 17), *United States* v. *Ryan*, 402 U.S. 530 (1971), does not address the appealability of a discovery sanction order. In *Ryan*, the Court held that denial of a motion to quash a grand jury subpoena could not be appealed. In that context, the Court noted that the lawfulness of the subpoena could be challenged later if the petitioner refused to comply and contempt proceedings were brought against him. 402 U.S. at 532. A contempt proceeding, of course, is an action separate from a grand jury proceeding, and an order holding a defendant in contempt would be a final order in the contempt proceeding, appealable under 28 U.S.C. 1291 See, *e.g.*, *Gelbard* v. *United States*, 408 U.S. 41 (1972). [illegible] 1 in *Dow Chemical Co.* v. *Taylor*, 519 F. 2d 352, 355 (6th Cir.), cert. denied, 423 U.S. 1033 (1975), the court dismissed

an appeal of an order requiring production of documents. The court noted that if "sanctions are applied, review of the order may be obtained." 519 F. 2d at 355. This dictum is not inconsistent with the decision of the court of appeals here; as noted above (see note 3, *supra*), the imposition of certain sanctions, such as a default judgment or dismissal of an action, is immediately appealable. The *Dow* court had no occasion to consider whether sanctions of the type imposed in this case would be immediately appealable.

Petitioner also alleges (Pet. 17) that there is an "evident conflict" in TECA itself in applying the *Cohen* collateral order doctrine. There is no basis for this assertion. The cases cited by petitioner involve completely different orders that cannot easily be compared to the order in this case. *Allied Paper, Inc.* v. *United Gas Pipe Line Co.*, 561 F. 2d 821 (TECA 1977), and *Sun Oil Co. of Pennsylvania* v. *FEA*, 572 F. 2d 867 (TECA 1978), involved orders staying the proceedings pending resolution of litigation in other courts. These orders effectively terminated the particular action in which they were issued. See 572 F. 2d at 870. *Marine Petroleum Co.* v. *Champlin Petroleum Co.*, No. 8-4 (TECA Feb. 25, 1980), involved the denial of a government motion for dismissal as a party. This order, completely collateral to the merits of the case, imposed the burden on the government of continuing in the litigation and being subjected to extensive discovery. Unlike the instant case, complete relief from the order could not have been obtained on appeal after a final disposition of the litigation. See slip op. 24.

2. Petitioner also contends (Pet. 8-14) that the sanctions imposed by the district court were unlawful. Whatever the merits of this contention, it is not presented for review here, because petitioner's appeal was dismissed by the court of appeals for lack of jurisdiction. Petitioner,

of course, will be entitled to appellate review of the propriety of the sanctions when a final judgment is entered in this case. The court of appeals did consider petitioner's challenge to the sanctions in the limited context of a mandamus petition, which it denied because it found that the district court did not abuse its discretion. That determination is correct, and petitioner apparently does not challenge it here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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